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What the Code Commission is Doing

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Code revision in a state where there has not been a revision for fifty-five years, as is the case in West Virginia, and where, during that period, the Legislature has passed more than thirty-six hundred acts covering every conceivable subject, and in many instances without regard to the then existing law; and where there have been ten private codes, as well as supplements thereto, the compilers of which, because of limited authority, could only dump the statutes into the places their individual judgment dictated they should go, might be likened to the experience of an excavating Egyptologist, for the deeper the digging into the heterogeneous mass the more are the surprises.

From my association with the Revision and Codification Commission, I feel safe in saying that its members now realize full well the import of Judge James H. Ferguson's statement when he said, "In undertaking this work I had no idea of the magnitude of the task I assumed, and in fact no one can form an idea of its magnitude who has not been engaged in a similar work." In this connection it might be mentioned that Judge Ferguson's labors only covered the preparation of the 1868 Code for publication, after the statutes comprising it had been revised, collated and digested by Daniel Lamb, Esq., whose work covered a period from 1863 to 1867, and by Judge R. L. Berkshire and Judge Thayer Melvin, who were engaged on the task from February 1867 to January 1868.

Realizing the intricate nature of the work and that a definite plan of procedure must first be mapped out, the members of the Commission, in order to have the advantage of the best thought of modern revisors, made a study of revisions in other states, including those of New York, Massachusetts, Wisconsin, Connecticut, North Carolina, Michigan, Ohio, Missouri, Kentucky, Delaware, Maine and Rhode Island, in addition to a careful examination of the revisions in the State of Virginia, from the first

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in 1631, down to and including the last, found in the Virginia Code of 1919. In addition to these investigations one of the Commissioners interviewed Judge Martin P. Burks, a member of the Commission of Revisors of the Virginia Code of 1919, and recognized as one of this country's most learned legal writers from whom many helpful suggestions were obtained. Inquiries were also directed to the Commissioners who had in charge the recent revisions of the Kansas and Alabama statutes, and they very generously responded with helpful matter pertaining to the work.

Following this preliminary investigation, the Commissioners evolved a general plan of procedure which is now being pursued. It embraces:

1. Ascertainment of the legislative history of each section of our present statute law.

2. Assembling under each section the provisions related thereto and now scattered throughout the Code.

3. Examination of the opinions of the West Virginia Supreme Court of Appeals, Supreme Court of Virginia and Federal Courts, construing each section, the result to be used as a guide in revision as well as for purposes of annotation.

4. Drafting of proposed changes.

5. Logical arrangement of subject matter to be accomplished by dividing it into chapters, the title of each chapter being general in nature, for example, Corporations; such general subjects to be further divided into appropriate articles as: (1) General Provisions Applicable to all Corporations; (2) Banks and Banking; (3) Trust Companies, etc., designating each class of corporation by a separate article; the articles to be divided into sections.

6. Working out a system of chapter, article and section numbering which will not be disrupted by future legislative enactments and to which concise citations may be made.

7. A comprehensive, but not cumbersome, index with cross references reduced to a minimum; a table showing the sections in the last compilation with the corresponding sections in the revised Code; table showing the complete statutory history of each section.

As a basis for carrying out items 1, 2 and 3 of the above plan, each section of our statute law, as taken from unbound copies of Barnes' Code, 1923, has been pasted on legal size sheets, one section at the top of each sheet. The legislative history (i. e. every

change and the date it was made) of the section from its enactment down to the present is then noted on the sheet immediately under the printed section. This investigation is carried back to the Code of Virginia of 1849, in every case where that code had a similar provision; and the Code of Virginia, 1919, the last revision in that state, is also examined to ascertain what changes have been made in Virginia since the separation of the states. Immediately thereafter a careful search is made to determine whether there are any similar or closely related provisions now appearing in Barnes' Code, 1923, being the last compilation, and the result of this search is then noted under the data covering the legislative history. The decisions of the West Virginia Supreme Court of Appeals, Supreme Court of Virginia and the Federal Courts, construing the section or commenting thereon, are then examined and notes made of any information which has value for purposes of revision.

These penciled notes are typed on sheets identical with the one used in writing the data in the first instance and also having the printed section pasted at the top. Copies of any suggestions received from the judges and lawyers in the State are then appended, so that each Commissioner may have before him the complete information regarding each section when giving it his individual attention. After a sufficient time has elapsed for the noting of results of their individual consideration a conference of the Commissiners is held, at which time the section is discussed with a view to final disposition. If it happens to be a section which has been in existence since 1849, and has survived the revision of 1868 in our State and subsequent sessions of our Legislature, as well as the revisions of 1887 and 1919 in Virginia, and if in addition no clear objection to its provisions is seen or has been indicated by court decisions, or by suggestions contained in letters from the Judiciary or the Bar, it has been the policy of the Commission not to make any change in such section. When, on the other hand, a change is decided upon in conference, as a preliminary step to making such change, the codes of such states as Virginia, New York, Massachusetts, Wisconsin, Connecticut, Delaware, Ohio, Nebraska, North Carolina and Kentucky are examined to get the benefit of the thought of the revisors and legislatures in those states, especially with regard to statutes that have stood the test of time. For example, the inadequacy of § 22, ch. 72, Code, to relieve a lessee of land and an office building thereon

from paying rent when the building is destroyed by fire or other cause beyond his control and without his fault, where such relief is not the subject of agreement between the parties, is pointed out by Judge Brannon's opinion in the case of Arbenz v. Exley, Watkins and Co., 52 W. Va. 476. On examining Consolidated Laws of New York, 1909, it was found that the legislature of New York had provided against such liability for rent by enacting the following statute, found in ch. 52, art. 7, § 227, Consolidated Laws, 1909. "Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to surrender." In Wisconsin Statutes, 1921, Vol. II, ch. 99, § 2196a, a provision identical with the New York statute appears. The fact that at least two states have used the same language in enacting a particular statute and that it has been in force for sometime in each state argues its efficacy.

When utilizing in toto the statutes of other states, it is the policy of the Commission to indicate the source in order that the decisions of the appellate court of that state construing the particular statute may be resorted to with facility.

Before making any change in the wording of a section the decisions of our own Supreme Court, as well as any decisions of the Supreme Court of Virginia or the Federal Courts construing the section, are examined. Such interpretative decisions serve at least two purposes: First, they point out the advisability of leaving unchanged the wording of a section which is awkward in construction but sound in substance, in order that there may be no possibility of losing the benefit of previous judicial constructions; second, they frequently indicate defects and hints covering their remedy.

The carrying out of items 1, 2 and 3 of the general plan also brings to the Commissioners' attention the obsolete, inconsistent, unintelligible and duplicated portions of the Code, as well as related portions which are scattered throughout its pages.

The following list includes an example of each of these five defects.

(1) Chapter 74A, "Voluntary Conveyances Made During Civil War," is now obsolete.

(2) Section 4, ch. 40, relating to relief from a county levy which term, as used in this section, apparently includes assessments, and §§ 129 and 132a., ch. 29, relating to the same general subject, are inconsistent.

(3) Section 19, ch. 156, pertaining to payment of costs by accused when his commitment is superceded or his recognizance is discharged, is unintelligible as it now appears. However, its purport is made clear when ch. 156, Code of West Virginia, 1868, is examined, for this examination discloses that § 20 of that chapter, which corresponds to § 19 of ch. 156, Barnes' Code, 1923, was immediately preceded by a section (omitted in the amendment and reenactment of chapter 156 by the Legislature in 1882), authorizing a judge or justice to supersede the commitment or discharge the recognizances as to the accused and the witnesses if, with specified exceptions, a person was in jail or under recognizance to answer a charge of assault and battery or other misdemeanor, for which there was a remedy by civil action, if the injured party acknowledge that he had received satisfaction for the injury and if accused pay the accrued costs.

(4) The offences specified in § 8, ch. 148, are duplicated in § 19 of ch. 149, but the penalties are different.

(5) Some of the many provisions relating to service of process on corporations are: § 6, ch. 41; §§ 34 and 35, ch. 50; §§ 18 and 20 ch. 52; § 61, ch. 53; §§ 24a., 37 and 78 a.(8), ch. 54; § 7, ch. 54A; § 16, ch. 54C; § 21a., ch. 55; § 18, ch. 55A; § 1, ch. 55B; §§ 2, 7 and 8, ch. 124.

As a check on the accuracy of the information secured in the manner detailed above and to make certain that no act of the Legislature has been omitted, one Commissioner has examined every act of the Legislature since the adoption of the 1868 Code.

In performing the work of annotation provided for in the Act creating the Commission, each section is being thoroughly annotated, the original reports being used as the source. Various digests and previously annotated codes as well as Shepard's Citations are utilized as checks on the accuracy of this work. This method of annotation necessarily takes a great deal of time but the Commissioners feel that the many inaccuracies found in previous annotations prohibit their use as being authorative. One of the most flagrant examples of such inaccuracies is found in

§ 16, chapter 71, where the only annotation given in any West Virginia Code is a Virginia case to the effect that spendthrift trusts are not valid, when, as a matter of fact, in the case of Guernsey v. Lazear, 51 W. Va. 328, decided March 29, 1902, and the case of Hoffman v. Beltzhoover, 71 W. Va. 72, decided October 8, 1912; and by dicta in McCreery v. Johnson, 90 W. Va. 80, and other cases, spendthrift trusts, under certain circumstances, are upheld. When it is taken into consideration that § 16, chapter 71, was identical with the Virginia statute at the time the Virginia case, cited in our codes under § 16, was decided, the misleading effect of the annotation is made more impressive.

It has been said that what is not in the index is not in the code, in other words, that the value of a code is largely dependent upon its having an adequate index. The members of the Commission are thoroughly sensitive to this suggestion and care is being taken to insure the inclusion of every possible key word. The Commissioners realize the fact that no two minds classify alike and for that reason it will not be a one man index, but on the contrary the suggestions of every member of the Commission and of the staff will be utilized in an effort to get an index which will meet with general approval. As stated in an outline of the general plan, cross references will be reduced to a minimum. In addition to the general index there will be prefixed to each chapter a synopsis of the sections therein contained. In the event that the Code is published in two volumes, it is proposed to put all statutes which are used generally by the Courts and the Bar in the second volume, in the back of which volume will be placed the index. This will relieve lawyers from continually carrying both volumes when attending court.

It is very likely that the members of this Commission will forego the possibility of having a monument erected to their memory if, as was suggested by an eminent lawyer of the State in speaking before the last session of the State Bar Association, such should be the reward of the ones who are able to draw a distinction between a corporation and a joint stock company, for the present attitude of the Commissioners would indicate that if the revision to be submitted by them is adopted by the Legislature, joint stock companies will be a misnomer in West Virginia after the revised Code has received legislative sanction. Also many duplicated provisions relating to corporations and joint stock companies will be harmonized. This treatment of the corporation law and a

similar removal of duplicated sections in the general and primary election laws, together with a harmonizing of their provisions where possible, will result not only in clarifying these important statutes but in considerably reducing the contents of the Code.

Due to the intimate connection of one part of the Code with another, it has not been deemed advisable to send any of the chapters thus far revised to the printer, as it might be found necessary, as the work progressed, to make changes as to the portions which would have been printed, thereby causing large additional and unjustifiable expense.

It has been remarked that this Commission is the baby of the State Bar Association, and so far as the writer knows this reputed parentage has never been questioned. In fact one only needs to examine the proceedings of the 1918 and 1919 annual meetings of the Association to realize from the comprehensive and analytical treatment of the subject, "The Need For A Revision Of The West Virginia Code," by the Honorable James A. Meredith in a paper read by Judge Meredith before the 1918 session, and from the pertinent discussions and strong resolutions covering the necessity of a revision and urging the Legislature to provide for a Commission to perform the work, which it developed, as well as the pointed follow-up resolution to the same effect at the 1919 session, to realize that the Act of the Legislature of 1921, providing for the appointment of the Commission now engaged in revising the Code, and designating the scope of its work, was largely the outgrowth of the efforts of the State Bar Association.

A knowledge of the part the Bar Association has had in bringing about the creation by the legislature of this Commission and a realization of the manner of code which will be expected, taking past statements as a criterion, have contributed very much to the deep feeling of responsibility which I know, from hearing their repeated expressions, the Commissioners feel not only to the Bar but to the State. Every effort is being made to bring forth a Code which will measure up to expectations. The cooperation of the Bench and the Bar of the State will do much to accomplish such a result. Several helpful suggestions have already been received from our judges and lawyers in response to letters expressing the Commission's desire to have the benefit of their knowledge and experience. It is felt that special mention should be made of the interest shown by the Honorable Warren B. Kittle, Judge of the Nineteenth Judicial Circuit, who has been especially

kind in submitting drafts of suggested changes. It is the hope of the Commissioners that such assistance will be more wide spread and forthcoming with greater frequency in the future than in the past, for it will not only insure a better Code, but will militate against any possibility of the Bar Association disowning its child either in youth, full manhood, or old age.